Retnam a/l Suppan v Kamala a/p Ponnampalam

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8–33–1058 OF 2004
SURAYA OTHMAN J
19 NOVEMBER 2009

Family Law — Matrimonial property — Division of property — Claim for matrimonial home allegedly acquired solely by petitioner husband — Whether respondent entitled to fair share of matrimonial home — Whether respondent wife had contributed to welfare of family and home — Proportion of entitlement — Whether court should order sale of matrimonial home — Law Reform (Marriage and Divorce) Act 1976 s 76(2) & (4)

This was the petitioner's petition for the dissolution of the marriage he had contracted with the respondent in 1983. Until 1995 the petitioner and the respondent and their two children had stayed together in the matrimonial home in Kuala Lumpur, acquired by the petitioner in 1985. In 1995, after an argument the respondent had left the matrimonial home with her two children and had gone to stay with her parents. On 5 December 1996, the respondent had obtained a court order granting her maintenance of RM500 a month ('the maintenance order') but the petitioner husband had failed or refused to abide by the maintenance order. According to the respondent, on 13 March 1997 the petitioner had taken the two children, who were then 5 and 11 years of age, away from the maternal grandparents' home and placed them in an orphanage without her knowledge. The respondent claimed that she was unaware of the whereabouts of her children until 16 December 2004 when she found them in an orphanage. The respondent then took the children out of the orphanage and brought them to live with her in a low cost flat she had rented. The petitioner alleged that the children had been abandoned by the respondent and that he had placed them in an orphanage and paid RM300 for their upkeep. When the case came for trial both parties had withdrawn all their prayers and the only issue before this court was whether the respondent wife had any claim under s 76 of the Law Reform (Marriage and Divorce) Act 1976 ('Act') to the matrimonial home. The petitioner alleged that the matrimonial home had been purchased and paid for solely by him, without any contribution by the wife, and that he had maintained the said home and paid for all the expenses. The respondent alleged that she had been working prior to the marriage and that she had stopped work at the petitioner's request to take care of the home and family. The respondent further alleged that she had contributed RM1,000 in cash towards part payment of the deposit for the purchase of the house. The respondent wife pleaded that the court transfer the matrimonial home to her and the children so that they could stay there or in the alternative that the said

home be sold and the sales proceeds be distributed equally. The petitioner who submitted that the current value of the matrimonial home was RM85,000, claimed that since he was a retiree he depended on the rental proceeds from the said home for his monthly expenses. As such, he pleaded that the said home not be sold but be transferred to his son on condition that it was not sold without his knowledge while he was still alive.

Held, making an order for the sale of the matrimonial home with one third of the proceeds of the sale to be given to the respondent with costs to be borne by the petitioner:

(1) The respondent's claim fell under the second part of s 76 of the Act. Since the matrimonial home was acquired during the marriage by the sole effort of the husband and there was no documentary or other proof that the respondent had the means to contribute the RM1,000 in cash towards part payment of the deposit for the purchase of the house, the respondent's entitlement to a share of the matrimonial home would be lesser than that of her petitioner husband as prescribed by s 76(4) of the Act. From the evidence it was clear that the respondent had cared for the two children not only during the ten years when they were living in the matrimonial home but that she also took care of them when they were living with her parents and during the time she found them in the orphanage and took them to live with her. These facts showed that the respondent wife had contributed to the welfare of the family and home and that as such she was entitled to a fair share of the matrimonial home under s 76(4) of the Act (see paras 8–9).

(2) The petitioner in the present case had withdrawn all his EPF savings thereby denying the respondent and his children to any share therein. Further he had ceased paying any maintenance to the respondent and the children despite the maintenance order granting the respondent RM500. The husband's dereliction of his duty to pay maintenance followed by his action in separating the children from their mother showed his clear, calculative and vengeful intention of depriving both the respondent wife and the children of a normal family life and amounted to an abdication of his duty as a father. In the circumstances of this case it was found that if an order for lump sum payment was made it would not be obeyed by the petitioner. As such, after due consideration of the facts and circumstances of the case, it was found that the respondent was entitled to one-third of the proceeds of the sale (see paras 10,15 & 17).

(3) In the event the petitioner husband was reluctant to sell the house but desired that it be inherited by his son, he could pay the respondent one-third of the cash value of the matrimonial home, as valued by an authorised valuer (see para 17).

[Bahasa Malaysia summary

Ini adalah petisyen pempetisyen untuk pembubaran perkahwinan yang dimasukinya dengan responden pada 1983. Sehingga 1995 pempetisyen dan responden dan dua anak mereka tinggal bersama di rumah perkahwinan di Kuala Lumpur, yang diperolehi oleh pempetisyen pada 1985. Pada 1995, selepas pergaduhan responden meninggalkan rumah perkahwinan dengan dua anaknya dan tinggal bersama kedua ibu bapanya. Pada 5 Disember 1996, responden telah memperolehi perintah mahkamah memberikan dia nafkah sebanyak RM500 sebulan ('perintah nafkah') tetapi pempetisyen telah gagal atau menolak untuk mematuhi perintah nafkah tersebut. Mengikut responden, pada 13 Mac 1997 pempetisyen telah membawa kedua-dua kanak-kanak tersebut, yang pada masa itu berumur 5 dan 11 tahun, keluar daripada rumah datuk dan nenek mereka dan meletakkan mereka di rumah anak yatim tanpa pengetahuannya. Responden mengadu bahawa dia tidak tahu di mana anak-anaknya berada sehingga 16 Disember 2004 apabila dia menjumpai mereka di rumah anak yatim tersebut. Responden kemudiannya mengambil kanak-kanak tersebut keluar daripada rumah anak yatim tersebut dan membawa mereka tinggal bersamanya di flat kos rendah yang disewanya. Pempetisyen mendakwa bahawa kanak-kanak tersebut telah ditinggalkan oleh responden dan dia meletakkan mereka di rumah anak yatim dan membayar RM300 untuk nafkah mereka. Apabila kes dibicarakan kedua-dua pihak telah menarik balik permohonan-permohonan mereka dan satu-satunya isu di hadapan mahkamah ini adalah sama ada responden mempunyai apa-apa tuntutan di bawah s 76 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') untuk rumah perkahwinan. Pempetisyen mendakwa bahawa rumah perkahwinan telah dibeli dan dibayar oleh dia semata-mata, tanpa apa-apa sumbangan daripada isteri, dan dia telah menyelenggara rumah tersebut dan membayar kesemua perbelanjaan. Responden mendakwa bahawa dia telah bekerja sebelum berkahwin dan dia telah berhenti bekerja di atas permintaan pempetisyen untuk menjaga rumah dan keluarga. Responden selanjutnya mendakwa bahawa dia telah menyumbang tunai sebanyak RM1,000 terhadap sebahagian pembayaran deposit untuk pembelian rumah tersebut. Responden memplid bahawa mahkamah memindah rumah perkahwinan kepada dia dan anak-anak supaya mereka dapat tinggal di sana atau secara alternatif bahawa rumah tersebut dijual dan hasil jualannya dibahagikan sama rata. Pempetisyen yang berhujah bahawa nilai semasa rumah perkahwinan tersebut berjumlah RM85,000, mendakwa bahawa memandangkan dia adalah pesara dia bergantung atas hasil sewa daripada rumah tersebut untuk perbelanjaan bulanannya. Oleh itu, dia memplid supaya rumah tersebut tidak dijual tetapi dipindah milik kepada anak lelakinya atas

syarat bahawa ia tidak akan dijual tanpa pengetahuannya semasa dia masih hidup.

Diputuskan, membuat perintah jualan rumah perkahwinan dengan satu pertiga daripada hasil jualan diberi kepada responden dengan kos ditanggung oleh pempetisyen:

(1) Tuntutan responden terangkum di bawah bahagian kedua s 76 Akta. Memandangkan rumah perkahwinan diperolehi semasa perkahwinan semata-mata atas usaha suami dan tidak terdapat dokumentar atau bukti lain bahawa responden mempunyai cara untuk menyumbang tunai sebanyak RM1,000 kepada sebahagian pembayaran deposit untuk pembelian rumah tersebut, hak responden terhadap syer rumah perkahwinan adalah kurang daripada pempetisyen seperti yang dinyatakan oleh s 76(4) Akta. Daripada keterangan adalah jelas bahawa responden telah menjaga kedua kanak-kanak tersebut bukan sahaja semasa 10 tahun apabila mereka tinggal di rumah perkahwinan tetapi dia juga telah menjaga mereka semasa mereka tinggal dengan kedua ibu bapanya dan semasa dia menjumpai mereka di rumah anak yatim dan membawa mereka tinggal bersama dengannya. Fakta ini menunjukkan bahawa responden telah menyumbangkan kepada kebajikan keluarga dan rumah dan oleh itu dia berhak kepada bahagian adil daripada rumah perkahwinan di bawah s 76(4) Akta (lihat perenggan 8–9).

(2) Pempetisyen di dalam kes ini telah mengeluarkan kesemua simpanan KWSPnya dengan itu menafikan responden dan anak-anaknya terhadap apa-apa bahagian di dalamnya. Selanjutnya dia berhenti membayar apa-apa nafkah kepada responden dan kanak-kanak tersebut walaupun perintah nafkah memberikan kepada responden sejumlah RM500. Keabaian tugas suami untuk membayar nafkah berikutan tindakannya memisahkan kanak-kanak tersebut daripada ibu mereka menunjukkan niat berkira dan suka membalas dendam yang jelas yang menafikan kedua-dua responden dan kanak-kanak tersebut daripada kehidupan keluarga secara normal dan menyebabkan pelepasan tugas sebagai bapa. Dalam keadaan kes ini didapati bahawa jika sesuatu perintah untuk pembayaran penuh dibuat ia tidak akan dipatuhi oleh pempetisyen. Oleh itu, selepas pertimbangan teliti terhadap fakta dan keadaan kes, didapati bahawa responden berhak kepada satu pertiga daripada hasil jualan (lihat perenggan 10, 15 & 17).

(3) Jika pempetisyen enggan menjual rumah tetapi ingin ia diwarisi oleh anak lelakinya, dia boleh membayar kepada responden satu pertiga nilai tunai rumah perkahwinan tersebut, seperti yang dinilaikan oleh penilai berkuasa (lihat perenggan 17).]

Notes

For cases on division of matrimonial property, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4152–4254.

Cases referred to

Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109; [1997] 1 CLJ 375, CA (refd)

Heng Peng Hoo & Anor, Re [1989] 3 MLJ 103, HC (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 76 (1), (2), (3), (4)

Raymond (R Nethaji Rayer & Co) for the petitioner.
Ranjeet Kaur (Ranjeet Gendeh & Associates) for the respondent.

Suraya Othman J:

APPLICATION

[1] This is a petition by the petitioner husband, Mr Retnam a/l Suppan praying for the dissolution of the marriage; custody, care and control of the two children of the marriage to him with no access to the respondent wife; vacant possession of the matrimonial home and cost of the petition to be borne by the respondent wife. The respondent wife agreed to the dissolution of the marriage but contested the other prayers and instead prayed for custody, care and control of the two children to be given to her with no access to the husband; the matrimonial home to be transferred to her name and that of the two children; RM2000 per month as maintenance for herself and the two children and cost of the petition to be borne by the petitioner husband. When the case came up for trial, parties has withdrawn all their prayers and the only issue before this court was with regard to the respondent's wife claim to the matrimonial home, that is, whether the respondent wife had made any contributions towards the matrimonial home to be entitled to any share in it, under the Law Reform (Marriage and Divorce) Act 1976.

BRIEF FACTS OF THE CASE

[2] The petitioner and the respondent were married on 26 March 1983 at the Sri Maha Mariamman Temple at Jalan Bandar Kuala Lumpur. The husband was employed as a clerk in a bank and the wife too was an accounts clerk in a firm of Messrs Abraham and Partners. After a year of marriage the wife alleged the husband requested her to stop work which she did and she became a full time housewife. In 1985 the husband bought their matrimonial home at No 11, Jalan Purtunia, Taman Mudun, Batu 9, Jalan Cheras, Kuala Lumpur and the couple stayed there until 1995. The marriage was blessed with

two children, a daughter Tineswary a/p Retnam, born on 10 September 1984 and a son Sarveendran a/l Retnam born on 20 November 1990. In 1995, there was an argument and the wife left the matrimonial home with the two children and they stayed at the wife parent's house. On 13 March 1997, the wife alleged the husband took the children away from the maternal grandparents' home and never returned them to her. The husband alleged that he took the children from the police station after his wife had abandoned them and after three months he put them (the children then 7 and 13 years old) in an orphanage, Pure Life Society Home and paid RM300 for their unkeep. The wife alleged she did not know of the whereabouts of her children until 16 December 2004 when she found them and took them to stay with her. She found a job to support them and moved out of her parent's house and rented a low cost flat in the same block as her parents due to space constraint. Since she left the matrimonial home in 1995, the husband has not paid any maintenance to her or the two children. The wife obtained an order from Kuala Lumpur Magistrate Court on 5 December 1996 vide *Permohonan Pemula No 78–23 Tahun 1996*, where she was granted maintenance of RM500 a month. The husband failed or refused to abide by the magistrate's court order alleging no knowledge of it despite the fact that he was represented by counsel on the said hearing.

THE LAW

[3] The respondent wife's claim to the matrimonial home comes under s 76 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) (LRA 1976) which gives the court power, when granting a divorce or judicial separation, to order the division between parties of any assets acquired by them during the marriage. The section is divided into two parts: s 76(1) and (2) pertains to assets acquired by the joint efforts of both parties to the marriage and s 76(3) and (4) pertains to assets acquired by the sole effort of one party to the marriage.

[4] Section 76 provides:

> 76 Power for court to order division of matrimonial assets.
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them *during the marriage by their joint efforts* or the sale of any such assets and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1) the court shall have regard to —
>
> (a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
>
> (b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage, A

and subject to those considerations, the court *shall incline towards equality of division.*

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired *during the marriage by the sole effort of one party* to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale. B

(4) In exercising the power conferred by subsection (3) the court shall have regard to —

(a) The extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by liking after the home or caring the family; C

(b) The needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case *the party by whose effort the assets were acquired shall receive a greater proportion.* D

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts. E

[5] As can be seen from the section above, when the matrimonial property is acquired by the joint efforts of both parties to the marriage and after taking into consideration the three factors in sub-s 2, the court shall incline towards equality of division of the property between the husband and wife. But if the property is acquired by the sole effort of one party, then after taking into consideration the two factors in sub-s 4, the court may divide the assets in such proportion as the court thinks reasonable, but the party by whose effort the assets were acquired shall receive a greater proportion. F G

EVIDENCE/TESTIMONY OF THE PARTIES

[6] In this case the court has to consider all the circumstances to see under which part the claim by the wife falls. This is so since the husband has alleged that the matrimonial home was purchased and paid by him solely without any contribution by the wife and that he had maintained the said home from the beginning and paid for all the expenses. He testified that since the wife left the said home in 1995, she had not contributed to the welfare of the family since then. In fact he alleged that the wife had abandoned the children at her relative's house and that it was he that had provided the children with the parental care and financial support they needed. He is not willing to allow his wife and children to stay in the home since being a retiree he needed the rental money H I

from the said home to cover for his monthly expenses. He testified that the said home was bought at the purchase price of RM98,500 in 1995 and the current value is RM85,000. He maintained that the wife is not entitled to any payment from him and pleaded to the court not to sell the said home and instead offered to transfer the said home to his son with the condition that the son will not sell the home without his knowledge while he is still alive.

[7] The respondent wife gave evidence that she was working prior to the marriage and after one year of marriage the husband requested her to stop work to take care of the home and family. She, the husband and children, stayed in the home for ten years from 1985 till 1995 during which time she took care of all their needs. She contributed RM1,000 in cash towards part payment of the deposit for the purchase of the house. Since 1995 after she left the said home with the children, the husband has not paid any maintenance to them despite the fact that she had obtained a magistrate's court order dated 5 December 1996 granting her maintenance of RM500 a month. She testified that she was deprived of her children from 13 March 1997 when her husband took them away from her parent's flat and never returned them only to put them in an orphanage without disclosing their location to her. She only discovered their location on 16 December 2004 after which she took them out of the orphanage, took a job, moved out of her parents flat to another flat in the same block to provide a more conducive and spacious home for her children to stay in. The wife pleaded to this court to transfer the said home to her and the children so that they could stay at the said home or in the alternative prayed that the said home be sold and the sales proceed be distributed equally.

FINDING OF THE COURT

[8] After sieving through the testimonies of both the parties I feel that the claim by the wife falls under the second part of s 76 of the LRA 1976 that is the said home was acquired during the marriage by the sole effort of the husband. This is so since it was not denied by the wife that all payments for the loan towards the purchase of the home were made by the husband and that he paid for all the incidentals toward the maintenance of the home. Her claim that she paid RM1,000 cash towards part payment for the deposit of the home is not substianted. She had ceased working sometime in 1984 and the home was bought in 1985, thereby making it difficult for me to believe, without documentary or other proof, that she had the means to contribute the RM1,000. Be that as it may she is entitled to her share, thought the proportion should be lesser than that of her husband as prescribed by s 76(4) of the Act. It must be noted that the two factors to be taken into consideration in coming to the apportionment of her share is:

(a) the extent of the contribution made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family; and

(b) the needs of minor children, if any, of the marriage.

[9] It is not denied that the family (husband, wife and two children) were staying in the matrimonial home for a period of ten years whereby as a fulltime housewife, (she had ceased working then) she took care of the family and home. Even after she left the said home in 1995, she was still taking care of her two children, then 5 and 11 years old in her parents flat until 1997 when her husband took them away and put them in an orphanage without her knowledge. She again took care of the children in her own flat from 16 December 2004 (her children then 20 and 14 years old) till now that they have grown up to be young adults of 25 and 19 years old. Therefore her caring for the children did not just spanned around the ten years period when they were all living together as a family in the matrimonial home but extended to the time when they were living with her parents and after she had taken them out of the orphanage till they reached adulthood.

[10] As stated earlier, after the wife left the said home in 1995 with her children, the husband ceased paying any maintenance to her and the children despite the magistrate's court order granting her maintenance in 1996. The husband had also withdrawn all his EPF savings thereby denying the wife and children to any share therein.

[11] In the Court of Appeal case of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109; [1997] 1 CLJ 375 Mahadev Shanker JCA stated:

> ... during the subsistence of a marriage, the expression 'matrimonial assets' refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole.

[12] At p 375 of the said case the learned judge state per curiam:

> Upon a careful reappraisal of all the material put before the learned trial judge, we must place upon record our disappointment at how the husband viewed his financial obligations to his wife and daughters. Had there been a cross appeal we would have approved a reasonable amount for her maintenance or an increased share of the matrimonial home or both.

[13] In our present case the husband refused to allow the wife and children to occupy the said home since he wanted to rent it out to cover for his monthly expenses. He also did not desire the said home to be sold and the proceeds divided preferring to transfer it to his son with the condition that the son will not sell the home without his knowledge while he is still alive. All his wishes boil to depriving the wife of any benefits from the marriage.

[14] In the case of *Re Heng Peng Hoo & Anor* [1989] 3 MLJ 103, the applicant wife applied for an order for the division of property and claimed a half-share of the matrimonial home registered in the name of the husband. After considering the entire evidence, the court was satisfied that the property was not jointly acquired but was acquired by the sole effort of the husband. The court did not order for division of the matrimonial home but instead made an order for a lump sum payment of RM10,000 as contribution by the wife in rendering domestic services to the husband and towards the welfare of the family by looking after the home and the four children. The property was bought at RM38,000 in 1978 and there was RM20,000 outstanding still owing to the bank. At the time the court made the order in 1989, there was no evidence as to the actual value of the property, therefore the proportion of the RM10,000 to the actual value of the property cannot be ascertained.

[15] In our present case the matrimonial home is free from encumbrance since the husband had fully paid the loan for the home. *The pertinent question here is what is a fair proportion to be given to the wife for the services she had rendered to the welfare of the family by looking after the home or caring for the family.* The proportion must take into account the fact that the husband had not paid any maintenance whatsoever to her and the two children since she and the children left the said home in 1995. This was despite the magistrate's court order granting her maintenance of RM500 a month in December 1996. The husband's dereliction of his duty to pay maintenance, followed by his wicked action in taking away the children and separating them from their mother in 1997, putting them in an orphanage, withholding their location to her until she discovered their whereabouts in 2004; all these showed his clear, calculative and vengeful intention of not only depriving his wife but also his two young children of the comfort of living and growing together in a normal loving family. His action was shameful to say the least and a sheer abdication of his duty as a father. The wife and the children must have been extremely devastated and emotionally broken down by his action which had literally turned the children into orphans even when both parents are still alive.

[16] I feel an order for the payment of a sum of money as in *Re Heng Peng's* case is not suitable in this case. This is so since the husband may not have the ready cash as he had withdrawn all his EPF savings and by his own admission that he needed the rental money from the matrimonial home to pay for his monthly expenses. His refusal to pay the RM500 a month maintenance to his wife even when ordered by the magistrate court in 1996 showed his miserliness and his sheer abhorrence in parting with cash. As such if an order for a lump sum is made, with his poor record, I feel it will not be obeyed. His estimation of the value of the home at RM85,000 in 2009 when the purchase price was RM98,500 in 1995 showed that he is not being completely honest and he is

resolute and determined to short change his wife.

CONCLUSION

[17] In the light of the above and after due consideration to all the facts and circumstances of this case, it is manifestly clear that the wife had contributed to the welfare of the family and home by rendering domestic services to her husband for the ten years they were together and taking care of the two children till they reached adulthood and as such is entitled under s 76(4) of the LRA 1976 to her fair share of the matrimonial home. I therefore make an order that the matrimonial home be sold and 1/3 of the proceeds from the sale to be given to the wife. If the husband is reluctant to sell the house and desires it to be inherited to his son, he can still do so with the consent of the wife but he has to have the home valued by an authorised valuer and 1/3 of the value in cash must be given to her. Costs is to be borne by the husband.

Order for sale of matrimonial home with one third of proceeds of sale to be given to respondent with costs to be borne by the petitioner.

Reported by Kohila Nesan